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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-734

ELIZABETH A. SMITH, et al.,

Petitioners,

vs.

ROBERT TROYAN, et al.,

Respondents,

SUPPLEMENTAL BRIEF AND APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-734

ELIZABETH A. SMITH, et al.,

Petitioners,

v.

ROBERT TROYAN, et al.,

Respondents.

Petition For A Writ Of Certiorari To The
United States Court Of Appeals For The Sixth Circuit

SUPPLEMENTAL BRIEF AND APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

This Supplemental Brief and Appendix is being filed pursuant to Rule 24(5) of the Rules of this Court.

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On March 23, 1976, this Court rendered its decision in Liberty Mutual Insurance Company v. Wetzel, ____ U.S. ____, 96 S. Ct. 1202 (1976), ruling that the District Court's order in that case was not appealable, and vacating the judgment of the United States Court of Appeals for the Third Circuit with instructions to dismiss the appeal. Because this recent decision is relevant to issues present in their petition filed in this Court on November 18, 1975, Petitioners now file this Supplemental Brief and Appendix. 1/

SUPPLEMENTAL STATEMENT OF THE CASE

On September 6, 1973, United States District Judge Thomas Lambros entered a memorandum opinion and order in Elizabeth A. Smith, et al. v. City of East Cleveland, et al., 363 F. Supp. 1131 (N.D. Ohio 1973) (A-1 -- A-58). In its opinion the District Court declared certain employment practices of the Defendants to be unlawfully discriminatory. The District Court deferred any decision on the Plaintiffs' request for injunctive relief choosing only to continue the interim relief already in effect. The Defendants were directed to submit a proposed plan for the implementation of the

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1/ References to material appearing in the Appendix to the Petition for Certiorari are preceded by the initial "A". References to material appearing in the Supplemental Appendix attached to this Brief are preceded by the initial "B".

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Court's ruling to which Plaintiffs would respond. A hearing to discuss final relief was scheduled for October 12, 1973. (A-58). The parties filed their individual plans in compliance with the Court's order in late September. On October 2, 1973, the District Court, recognizing the problems inherent in securing a police entrance examination which would not discriminate on the basis of race, requested counsel in The Shield Club v. City of Cleveland, 370 F. Supp. 251 (N.D. Ohio 1973) (a case raising, inter alia, questions of race discrimination in police hiring and promotion) to appear as amicus curiae at the conference on relief. (B-1, B-2).

On October 3, 1973, prior to the conference, the Defendants filed their notice of appeal, purporting to appeal from "the final judgment entered . . . on the 6th day of September 1973." (B-3). 2/ Defendants did not move for certification of that memorandum opinion and order pursuant to Title 28 U.S.C. §1292(b). 3/ No separate document or

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2/ Although Plaintiffs filed a protective notice of appeal on October 17, 1973, they expressly reserved their right to challenge the timeliness of Defendants' appeal. (B-4, B-5).

3/ On October 24, 1973, the District Court, being "of the opinion that the memorandum opinion and order of September 6, 1973, involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially

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judgment relative to the September 6, 1973, order was ever entered by the Court. (B-7, B-11, B-18, B-22).

In response to Defendants' notice of appeal, Plaintiffs, on October 23, 1973, moved to dismiss the appeal. The Court of Appeals, in denying Plaintiffs' motion concluded that "to the extent the Memorandum Opinion and Order issued by the District Court on September 6, 1973, is not a final judgment, but is an interlocutory order granting injunctive relief, the same is appealable under 28 USC § 1292(a)(1)." B-9).

In late May, 1974, prior to oral argument in the Court of Appeals, Plaintiffs learned that the Defendants intended to administer a police entrance examination and to hire police officers without seeking or obtaining the District Court's approval of the examination, eligibility restrictions and other procedures. Plaintiffs sought to hold the

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Footnote 3 continued

advance the ultimate termination of the litigation," certified the matter sua sponte, nunc pro tunc. The District Court also stayed any further proceedings until a decision by the Court of Appeals. (B-7). Because the Defendants never applied to the Court of Appeals for leave to appeal, jurisdiction pursuant to Title 28 USC § 1292(b) was never perfected. Liberty Mutual Insurance Company v. Wetzel, 96 S. Ct. at 1207.

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Defendants in contempt for violation of the District Court's order of September 6, 1973. In ruling on the contempt motion, the District Court clarified that order:

> "Although the Court clearly indicated its intention to grant certain injunctive relief consistent with its findings of fact and the declaratory relief offered, such injunctive relief was not granted in the Order. The Court stated that it would enjoin certain activities in an effort to apprise the parties of the direction of the Court so that they might take such intended court action into account in drawing up their respective proposals for an acceptable testing and hiring program. No relief other than declaratory relief was granted." (B-13)

Thus, because there was no specific order barring the Defendants' unilateral development and implementation of a new hiring program, the Court did not hold the Defendants in contempt at that time, but instead scheduled a hearing to consider Plaintiffs' motion to hold Defendants in contempt of the interim relief and to proceed with the fashioning of final relief. (B-16, B-18). [4/]

[4/] The stay, previously entered by the Court, was vacated by the Order of June 26, 1974. See note 3, supra.

Prior to this hearing, Defendants sought to terminate the proceedings in the District Court on the grounds that the Court lacked jurisdiction. Consequently, on July 18, 1974, the District Court issued another order concerning the status of the case. At this time the Court determined that "it would be unseemly to proceed with further consideration or to take further action relative to the shaping of final relief at this time," B-20) in light of the action of the Court of Appeals. 5/ The District Court then deferred the fashioning of final relief, leaving in effect the interim relief previously granted by the Court.

The Plaintiffs next attempted unsuccessfully to have the Court of Appeals reconsider its April 4, 1974, order. (B-28).

ARGUMENT

The facts of this case are strikingly similar

5/ Although the District Court was aware that the Court of Appeals had recognized the appeal, the District Court was not certain "whether the Court of Appeals Order of April 4, 1974 refers to the interim relief only as the subject of appeal under 28 USC § 1292(a)(1), or whether the Court has interpreted this Court's statement of intent to issue other final injunctive relief based on its September 6th findings as an interlocutory decree from which an appeal would be proper under 28 USC §1292(a)(1)." (B-24 n. 2).

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to those present in Liberty Mutual Insurance Company v. Wetzel, supra. In Smith, as in Liberty Mutual, the Plaintiffs received a favorable ruling on the issue of Defendants' liability. However, with the exception of a declaratory judgment, none of the relief sought by Plaintiffs was granted. While Plaintiffs' request for attorneys' fees was denied, their prayers for injunctive relief, back pay, costs and affirmative relief were left unresolved. The District Court's order of September 6, 1973, thus was not appealable as a final order pursuant to 28 U.S.C. § 1291. Liberty Mutual Insurance Company v. Wetzel, 96 S. Ct. at 1206.

Similarly, the District Court's order was not appealable pursuant to 28 U.S.C. § 1292(a)(1) since the Court issued no injunction. The District Court, both before and after the notice of appeal was filed by the Defendants consistently recognized that only declaratory relief had been awarded. (A-57, B-1, B-6, B-11, B-13, B-18, B-22, B-24 n. 2, B-26).

The procedure followed by the Defendants herein is the practice expressly rejected in Liberty Mutual. Unlike the District Court in Liberty Mutual, which attempted, albeit unsuccessfully, to expedite an appeal, the District Court in Smith, continually insisted that it had not yet entered any order that could be appealed. As this Court pointed out in Liberty Mutual, were it to sustain the procedure followed by the District Court there, it:

> "would condone a practice whereby a district court in virtually any case before it might render an interlocutory decision on the question of liability of the defendant, and the defendant would thereupon be permitted to appeal to the Court of Appeals without satisfying any of the requirements that Congress set forth." 96 S. Ct. at 1207.

The Court further noted that it:

> "would twist the fabric of the statute more than it will bear if we were to agree that the District Court's order . . . was appealable to the Court of Appeals." 96 S. Ct. at 1207.

If the procedure utilized in Liberty Mutual Insurance Company, supra, is a "twist[ing of] the fabric of the statute", the procedure utilized in Smith has rent it. The decision of the United States Court of Appeals for the Sixth Circuit can be no more valid than was the decision of the Third Circuit. It therefore should be vacated with instructions to dismiss the appeal of the Defendants.

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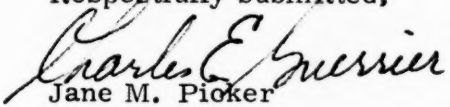
CONCLUSION

For these additional reasons, Petitioners pray that this Court grant their petition for a writ of certiorari.

Respectfully submitted,



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APPENDIX B

B-1
Order of District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed Oct. 2, 1973)

ELIZABETH A. SMITH,

Plaintiff,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

On September 6, 1973, the Court entered a memorandum opinion and order which declared certain employment practices of the East Cleveland Police Department to be unlawfully discriminatory. The Court deferred decision on plaintiffs' requests for injunctive relief and requested defendants to propose appropriate programs to implement the Court's rulings. A conference to discuss the proposed relief and any objections which may be inter-

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posed by plaintiffs thereto will be held on Tuesday, October 9, 1973, at 11:00 a.m.

Having taken judicial notice that the question of securing an examination for police applicants which does not discriminate on the basis of race has arisen in another case in this District, The Shield Club v. City of Cleveland, C72-1088, the Court has requested counsel in that suit, R. Edward Stege and Malcolm Douglas, to appear as amicae curiae at the conference.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: 10/2/73

B-3
Notice of Appeal

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed Oct. 3, 1973)

ELIZABETH A. SMITH, et al.,

Plaintiffs,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

Notice is hereby given that Defendants Robert Troyan, Reginald Gower, James Ritchie, and James Barrett, in their official capacity hereby appeal to the United States Court of Appeals for the Sixth Circuit from the final judgment entered in this action on the 6th day of September, 1973.

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B-4
Notice of Cross Appeal

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C 73-299

(Filed Oct. 17, 1973)

ELIZABETH A. SMITH,

Plaintiff,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

Notice is hereby given that Plaintiff Elizabeth A. Smith, on behalf of herself and all others similarly situated, hereby cross-appeals the issue of whether the Army General Classification Test discriminates on the basis of sex and the failure to grant attorneys' fees to the United States Court of Appeals for the Sixth Circuit from the Memorandum and Order entered in this action on the 6th day of September, 1973.

This cross appeal is intended to protect the

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interests of the Plaintiff and the class which she represents. This cross appeal should not be construed as an admission by Plaintiff that said appeal by Defendants, Robert Troyan, Reginald Gower, James Ritchie and James Barrett, in their official capacities, is timely filed and is not intended by Plaintiff to be a waiver of any rights to oppose Defendants' appeal as untimely.

Respectfully submitted,

Rita Page Reuss

Jane M. Picker

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B-6
Order of District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed Oct. 24, 1973)

ELIZABETH A. SMITH,

Plaintiff,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

On September 6, 1973, the Court entered a memorandum opinion and order which declared certain employment practices of the East Cleveland Police Department to be unlawfully discriminatory. The Court deferred ruling on plaintiffs' requests for injunctive relief and requested defendants to propose appropriate programs to implement the Court's rulings.

On October 3, 1973, defendants filed a

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notice of appeal. They did not move for a certification of that memorandum opinion and order pursuant to 28 U.S.C. §1292(b) and no final judgment had been entered in the case.

Notwithstanding defendants' failure to request certification, the Court is of the opinion that the memorandum opinion and order of September 6, 1973, involves controlling questions of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation. The Court will therefore certify this matter sua sponte pursuant to 28 U.S.C. §1292(b) and, in order to prevent further delay in the appeal, will order such certification entered nunc pro tunc as of October 2, 1973.

It is further ordered that all proceedings in this case shall be stayed pending a determination by the Court of Appeals and that the interim relief previously provided shall continue in effect.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: October 24, 1973

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B-8
Order of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 73-2226 and 2227

(Filed Apr. 4, 1974)

ELIZABETH A. SMITH, et al.,

Plaintiff-Appellees

v.

CITY OF EAST CLEVELAND, et al.,

Defendants-Appellants

Before: WEICK, EDWARDS, ENGEL,
Circuit Judges

This case having been assigned by the Chief Judge to this panel pursuant to Rule 3(e) of the Rules of the Sixth Circuit for the purpose of ruling upon a motion of Plaintiff-Appellee to dismiss the appeal herein because the judgment appealed from is not a final judgment and because this court is without jurisdiction to entertain the appeal under 28 U.S.C. §1292(a) for failure of the appellant to apply to this court for leave to appeal within ten days after entry of the order appealed from;

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B-9

Order of the Court of Appeals

It appearing to the court that to the extent the Memorandum Opinion and Order issued by the District Court on September 6, 1973 is not a final judgment, but is an interlocutory order granting injunctive relief, the same is appealable under 28 U.S.C. §1292(a)(1),

IT IS ORDERED that the motion to dismiss is denied, but without prejudice to raise such issues before the panel to whom the appeal is assigned for decision on the merits.

ENTERED BY ORDER
OF THE COURT

/s/ John P. Hehman
Clerk

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B-10
Memorandum Opinion and Order
of the District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed June 26, 1974)

ELIZABETH A. SMITH, et al.,

Plaintiffs,

v.

THE CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

On September 6, 1973, after a lengthy trial to the Court on the claims presented by the plaintiff on behalf of herself and all other similarly situated, this Court issued a Memorandum Opinion and Order. In that Order, which is reported at 363 F. Supp. 1131, the Court set forth its findings of fact with regard to plaintiffs' claim that practices and restrictions of defendants in hiring police officers in East Cleveland, Ohio, denied blacks and women their

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equal protection under the law in violation of 42 U.S.C. §1983 and the Fourteenth Amendment to the Constitution. Although the Court granted certain declaratory relief sought by the plaintiffs in this regard, the Court deferred entry of final injunctive and affirmative relief to be afforded plaintiffs in an effort to provide the defendants, as well as the plaintiffs, an opportunity to submit a proposed plan for the implementation of the Court's rulings. In view of the complexities involved in the development of an affirmative action plan, the Court ordered the defendants to submit its proposal within twenty (20) days of the Court's Order, instructed the plaintiffs to respond within ten (10) days thereafter, and scheduled a hearing to discuss final relief for October 12, 1973. The parties complied with the Court's Order in this regard, however, on October 3, 1973, prior to the hearing, the defendants filed a notice of appeal. Although no appealable order had been entered by this Court in the case as of that date, the Court was of the opinion that its Order of September 6, 1973, did involve controlling questions of law as to which there were substantial grounds for differences of opinion and that an immediate appeal from the order might materially advance the ultimate termination of the lawsuit. Having determined that the Order met the guidelines set forth in 28 U.S.C. §1292(b) for certification of an otherwise non-appealable Order, this Court entered an Order, sua sponte, on October 24, 1973 certifying the appeal as of October 2, 1973 nunc pro tunc. In addition, the certification order provided for a stay of proceedings pending

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the appeal and ordered that any and all interim relief previously granted by this Court would remain in effect. That appeal is still pending.

On June 21, 1974, plaintiffs filed a motion in this Court to hold defendants and other individuals, including Henry B. Fischer who is counsel for the defendants and Law Director of the City of East Cleveland, in contempt for violation of this Court's interim orders and for violation of this Court's Order of September 6, 1973. The Court's interim orders, which were injunctive in nature, limited the number of persons whom the City of East Cleveland should appoint to fill vacancies in the Police Department. This Court clearly ordered that such interim relief would remain in effect pending the appeal in this case. However, before proceeding to a consideration of the plaintiffs' allegations in this regard, the Court will first consider plaintiffs' allegations regarding defendants' violation of the September 6th Order.

Plaintiffs have apprised the Court that the City of East Cleveland has scheduled a police examination for June 29, 1974. The defendants and Henry Fischer have filed a response to the plaintiffs' motion to hold them in contempt in which they confirm this fact. The plaintiffs assert that the distribution of applications and notices for the examination and the City's current testing program are all the product of a newly developed program which defendants have implemented without Court permission or approval.

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The defendants do not deny that they have instituted a new program, and in fact, the defendants state that the program now in effect is an implementation of the proposed Program Plan submitted by them to this Court pursuant to the Court's September 6th Order. The plaintiffs contend that the testing program violates certain injunctive relief granted in that Order. On the other hand, the defendants argue that there has been no order issued by the Court restraining them from implementing a new program and that this current plan can only be challenged by the plaintiffs in a separate lawsuit.

In light of the parties' contentions, this Court feels that it is necessary to clarify the Court's Order of September 6th. Although the Court clearly indicated its intention to grant certain injunctive relief consistent with its findings of fact and the declaratory relief afforded such injunctive relief was not granted in the Order. The Court stated that it would enjoin certain activities in an effort to apprise the parties of the direction of the Court so that they might take such intended court action into account in drawing up their respective proposals for an acceptable testing and hiring program. No relief other than declaratory relief was granted. As stated above, the Court was aware of its broad discretion in fashioning appropriate relief and deferred the issuance of injunctive or affirmative relief until such time as the parties had submitted their proposals and the Court could fashion, with their

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participation, final relief consistent with its findings. There was, therefore, no specific Order barring the defendants' unilateral development and implementation of a new hiring program.

Nevertheless, the Court rejects defendants contention that plaintiffs may not challenge their actions in so doing in this lawsuit. The only matter remaining for this Court's determination after entry of the September 6th Order was the matter of relief to be afforded the plaintiffs. Certainly defendants cannot argue that had no appeal been taken, they could have proceeded without leave or approval of this Court to implement the proposed plan which they submitted to this Court on September 21, 1973 pursuant to Court Order. The plaintiffs, having been successful in the prosecution of certain of their claims, would have been entitled to challenge that proposal at a hearing to determine the appropriate final relief. Merely because the defendants appealed this Court's Order, they cannot now assert, prior to the determination of the Court of Appeals, that the plaintiffs no longer claim a valid right to participate in the fashioning of appropriate relief in this suit or that this Court is automatically divested of the authority to determine what final relief it will order.

The Court is sympathetic with the difficulties which a municipality faces in the management of a police department. In addition the Court realizes that defendants herein have sought to

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expedite their appeal, which has been delayed due, to a large extent, to the Sixth Circuit Amended Local Rule 12(d) [1], which has caused a slow-down in completion of the transcript. However, when this Court issued its order certifying defendants' appeal and staying the proceedings herein, the Court intended that the stay would apply to the further fashioning of relief. The Court did not contemplate that the defendants would construe that stay order as divesting the Court of its supervision and ultimate determination on the relief to be afforded in this action.

A stay of matters in an appeal taken pursuant to §1292(b) is rarely appropriate under any circumstances. Fisons Limited v. United States, 458 F. 2d 1241, 1248 (7th Cir. 1972), cert. denied 405 U. S. 1041 (1972). The Court, therefore, in light of the circumstances which have developed, orders that the stay of proceedings in this Court previously entered herein is hereby vacated.

The stay having been lifted, this Court will proceed to determine the issue of final relief

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[1] This Amended Rule, entered June 11, 1973, provides that the Court Reporters must give procedence to preparation of transcripts in criminal appeals.

which was before it in September of 1973. The defendants and all agents and employees of the City of East Cleveland, or other persons having knowledge of this Order are, therefore, hereby enjoined from further implementation of that proposed plan which was submitted to but not approved by this Court. The aforementioned persons are further enjoined from distributing applications for or administering the current testing program on June 29, 1974, which program was developed without Court permission or supervision.

The motion to find the defendants in contempt is overruled at this time. However, the Court has scheduled a hearing on Monday, July 1, 1974 at 3:00 p.m. for the purpose of considering plaintiffs' motion to hold defendants in contempt of the interim injunctive relief and to proceed with the fashioning of final relief in this lawsuit.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: 6/26/74

B-17
Order of the District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed July 3, 1974)

ELIZABETH SMITH, et al.,

Plaintiffs,

v.

CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

Pursuant to the hearing held on July 1, 1974 in the above-captioned action, the Court orders the following:

1. Upon motion of the plaintiffs, their motion to hold defendants Troyan, Gowen, Ritchie and Barrett and Henry B. Fischer in contempt is dismissed;

2. The motion of defendants for stay of execution of this Court's judgment, made

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pursuant to Rule 62 of the Federal Rules of Civil Procedure, is overruled;

3. No final relief having been granted by this Court's Order of September 6, 1973 nor judgment entered in this case, the Court will proceed, in accordance with the provisions of 28 U.S.C. §1292(b), to fashion such final relief and enter final judgment;

4. The parties shall proceed with the schedule set forth at the hearing for filing and exchanging materials and to meet to discuss the police recruiting and testing program developed by East Cleveland;

5. An evidentiary hearing is scheduled for July 11, 1974 at 10:00 a.m., at which time the defendants shall present expert testimony with regard to their proposed plan and the development of their current program pursuant thereto. Plaintiffs shall have an opportunity to cross-examine defendants' witnesses at that hearing, however, such cross-examination will not prejudice plaintiffs' rights to recall defendants' experts for further cross-examination at a later time. Should plaintiffs deem discovery to be necessary after defendants' presentation, the Court will consider the appropriate motion(s) at that time.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

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B-19
Order of the District Court

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

No. C 73-299

(Filed July 18, 1974)

ELIZABETH SMITH, et al.,

Plaintiffs,

v.

THE CITY OF EAST CLEVELAND, et al.,

Defendants.

LAMBROS, DISTRICT JUDGE

In accordance with this Court's orders of June 26, 1974 and July 3, 1974, a hearing was scheduled in the above-captioned action for the purpose of shaping final injunctive and affirmative relief consistent with this Court's findings as set forth in a memorandum opinion and order of September 6, 1973 after a trial on the merits. Prior to the hearing, defendants filed several motions with this Court, including a motion to terminate the proceedings to fashion relief on the ground that this Court lacks jurisdiction to proceed in this regard.

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B-20
Order of the District Court

At the hearing on July 15, 1974, the Court permitted the parties to present arguments with regard to the present scope of this Court's jurisdiction in light of the appeal taken by defendants to the United States Court of Appeals for the Sixth Circuit and in light of an Order of that Court dated April 4, 1974 of which this Court was made aware through defendants' motion to terminate the proceedings herein. On the basis of the rather unusual developments in this matter since this Court issued its memorandum opinion and order on September 6, 1973, this Court determines that it would be unseemly to proceed with further consideration or to take further action relative to the shaping of final relief at this time. Therefore, for the reasons stated on the record of the July 15, 1974 hearing, which record is incorporated herein and set forth in pertinent part below, this Court will grant defendants' motion to terminate the relief proceedings at this time on the ground that this Court lacks jurisdiction to so proceed because of the April 4, 1974 Order of the Sixth Circuit Court of Appeals, unless and until such time as the plaintiffs may obtain a determination from that Court to the contrary.

At the hearing on July 15th after the parties had presented their arguments with regard to the jurisdiction of this Court, the Court made the following oral ruling:

> THE COURT: All right. Although it may appear from the statements of counsel and from these proceedings that there is some mystery as to what has transpired and the

effect of any findings or order of this Court, I don't believe there is any mystery, nor does anyone labor under a misapprehension as to the findings of this Court or the intent of this Court in its order of September, 1973.

The Court made its specific findings that defendants' enforcement of the minimum height and weight requirements for police officer applicants in East Cleveland unlawfully discriminates against women.

The Court also made a finding that defendants' use of the AGCT test to screen applicants unlawfully discriminates against blacks.

And the Court further found that defendants' application of the veteran's preference prior to determining whether the candidate is qualified violates Ohio law.

The Court did indicate that it would enjoin the further use of the AGCT test which unlawfully discriminates against blacks and that it would enjoin the further enforcement of the minimum height and weight requirements.

The Court wanted to give both sides a full and complete opportunity to actively participate in an adversary manner in the

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fashioning of the final relief and, therefore, following the Court's formal findings on the merits, the Court directed that the parties submit proposed plans for the implementation of the Court's rulings within 20 days of the order issuing, and the Court did at that time schedule the case for hearing on final relief on October 12th, 1973.

The Court desired to receive the plans of the respective parties and have a full and complete evidentiary hearing and arguments of counsel so that it could effectively fashion final relief in issuing those necessary orders to cause, in effect, an implementation of the final relief.

Prior to that hearing on final relief, an appeal was taken by the defendants, challenged by the plaintiffs, and the Court of Appeals issued its ruling that to the extent that the order of September 6, 1973 is interlocutory or granting injunctive relief, that the appeal would be recognized, and it denied the order to dismiss of the plaintiffs, but without prejudice to raise such issues to the panel to whom the matter is assigned for decision on the merits.

No separate judgment was issued in this case, nor was a portion of this case or any part of this case certified for appeal.

Although it is not for this Court to make that determination because it would go beyond the realm of propriety, it clearly appears that with the absence of a certification of part of the case for appeal, that an appeal to the order is not properly taken, and it would appear that the present status of this case does not materially advance the ultimate determination of this litigation in that the City of East Cleveland is desirous of qualifying additional police officers.

If my recollection serves me correctly, there was a certification issued on a nunc pro tunc basis in order to satisfy the time requirements, and the Court did certify, but it was certified under 1292 contemplating that it would materially advance the ultimate determination of the litigation.

However, at such time as the City of East Cleveland proceeded to conduct another examination prior to fashioning of final relief by this Court, the Court made a determination that the appeal would no longer materially advance the ultimate determination of the appeal and then scheduled this matter for an evidentiary hearing on the final relief. 1/

1/ See this Court's Order of June 26, 1974, which vacated the stay previously imposed under 28 U.S.C. §1292(b).

However, my view is this. The Court of Appeals has recognized the appeal, [2/] and although the Court feels that there is authority based on the citations presented by the plaintiffs, Supreme Court citations relative to proceeding with other issues when there is an appeal on an interlocutory order, my view is that it would appear somewhat unseemly for this Court to proceed with further consideration of this case in view of the pendency of an appeal.

2/ The Court of Appeals in its Order of April 4, 1974 ruled that "to the extent that the Memorandum Opinion and Order issued by the District Court on September 6, 1973 is not a final judgment, but is an interlocutory order granting injunctive relief, the same is appealable under 28 U.S.C. §1292(a)(1)." The September 6, 1973 Memorandum Opinion and Order did continue the interim injunctive relief granted prior to the conclusion of the trial on the merits. However, it is not clear to this Court whether the Court of Appeals Order of April 4, 1974 refers to the interim relief only as the subject of appeal under 28 U.S.C. §1292(a)(1), or whether the Court has interpreted this Court's statement of intent to issue other final injunctive relief based on its September 6th findings as an interlocutory decree from which an appeal would be proper under 28 U.S.C. §1292(a)(1).

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> For that reason, it is my view that I shall take no further action in this case relative to final relief notwithstanding the city contemplating to conduct an examination for qualifying of additional police officers. Until such time as the Court of Appeals clarifies the status of this matter so that I may fully comprehend the parameters of this Court's jurisdiction, if any, pending the appeal, I shall take no further action in this matter.
>
> If the plaintiffs wish to apply for reconsideration of their previous motion to dismiss, or if a panel has been designated for the consideration of the case on the merits and you wish to submit the matter to that panel for consideration, or if the plaintiffs wish to file a mandamus action seeking to direct this Court to proceed with final hearing on any other alternative, certainly you may and should proceed in that fashion if it will aid in the clarification of this Court's authority to proceed with the fashion if it will aid in the clarification of this Court's authority to proceed with the fashioning [sic] of final relief.
>
> The Court will take no further action. [Tr. pp. 25-30].

It should also be noted with regard to this Court's statement on the record that the parties should have been under no misapprehension

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as to the findings of this Court in its September 6, 1973 order, that on October 2, 1973 (one day before the defendants appealed that order) this Court issued an order directing the parties to submit certain proposed programs for relief and setting forth a date on which a hearing was to have been held to consider such proposals. That October 2nd order specifically stated that the Court had deferred issuing any injunctive relief in its September 6th order. It was the Court's intention to proceed with the fashioning of final relief in an expeditious manner and terminate proceedings in this Court. The Court, therefore, did not enter a separate document or judgment relative to its findings on September 6th. It would appear that the entry of such a document is a prerequisite to the taking of an appeal pursuant to 28 U.S.C. §1292(a)(1). Columbus Coated Fabrics v. The Industrial Commission of Ohio, ____ F. 2d ____ (6th Cir. May 29, 1974).

The Court, prior to learning of the April 4, 1974 Order of the Court of Appeals, had proceeded in this action on the assumption that the September 6, 1973 Order was a non-appealable order. See Bradley v. Milliken, 468 F. 2d 902 (6th Cir. 1972), cert. denied, 93 S. Ct. 45 and Bradley v. Milliken, 484 F. 2d 215, 220 (6th Cir. 1973). 3/

3/ Although the Bradley case was a school desegregation case, this Court took a similar approach to the instant case since the Sixth Circuit has repeatedly held that a district court has broad

However, for the reasons stated above, this Court will defer taking further action toward the fashioning of final relief at this time. The interim relief previously granted limiting the number of vacancies which may be filled shall remain in effect.

IT IS SO ORDERED.

Thomas D. Lambros
United States District Judge

DATED: 7/18/74

Footnote 3 continued

discretion in fashioning relief in employment discrimination cases and that the judge's discretion will only be reversed in the shaping of that relief if there is an abuse of that discretion. See Thorton v. East Texas Motor Freight, _____ F. 2d _____ (6th Cir. May 21, 1974).

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Order of the Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 73-2226

(Filed Sept. 12, 1974)

ELIZABETH A. SMITH, et al.,

Plaintiff-Appellees,

v.

ROBERT TROYAN, et al.,

Defendant-Appellants.

Before: WEICK, EDWARDS, and ENGEL,
Circuit Judges

Plaintiffs-appellees having filed herein on August 13, 1974, their motion to reconsider the order heretofore entered in this appeal on April 4, 1974 denying their motion to dismiss, on consideration,

It is Ordered that said motion to reconsider be and the same is hereby DENIED.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
Clerk

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CERTIFICATE OF SERVICE

Three copies of Plaintiffs' Supplemental Brief and Appendix to the Petition for a Writ of Certiorari have been forwarded, by United States mail, first class, postage prepaid, to Charles T. Riehl, Esq., 1215 Terminal Tower, Cleveland, Ohio 44113, and Henry B. Fischer, Esq., Williamson Building, Cleveland, Ohio 44114, Attorneys for Defendants-Respondents, this 28th day of April, 1976.

Charles E. Guessier
Attorney for Petitioners

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